No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1957

HERBERT BROWNELL, JR., ATTORNEY GENERAL,
PETITIONER

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON, JOW MUN YOW AND JOW KWONG YEONG, YEN MOK, AND LAM WING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.
Department of Justice,
Washington 25, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Attorney General, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on June 27, 1957.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 7-10) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 27, 1957 (App. B, *infra*, pp. 11-12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether excluded aliens who have failed to establish their right to enter the United States and who have been admitted into the country only on parole are entitled to have applications for withholding of deportation entertained under Section 243(h) of the Immigration and Nationality Act of 1952, on the ground that, if deported, they would be subject to physical persecution.

STATUTES INVOLVED

Section 243(h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237(a) of the same Act provides in relevant part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported

to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * * *

Section 212(d) of the same Act provides in relevant part:

* * * *

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U.S.C. 154 (1946 ed.), provides in relevant part:

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. * * *

STATEMENT

The Court of Appeals for the District of Columbia Circuit has held, in four cases consolidated for briefing and argument, that the district court erred in dismissing, for failure to state a cause of action, complaints by excluded aliens which alleged that the Attorney General had wrongfully failed to consider their applications for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. Their applications alleged that they would be subject to physical persecution if deported to Communist China.

The complaints alleged, more particularly, that the plaintiffs named therein were persons born in China who had arrived in the United States, had been paroled into this country, and had been held excludable. The plaintiffs in two of the cases (Quan and Yow) claimed admission as United States citizens. They had arrived and had been paroled prior to the effective date of the Immigration and Nationality Act of 1952, but had been ordered excluded after the effective date of that Act (R. 33-34, 36-37). Respondent Yen Mok, who alleged merely that he had arrived in the United States in December 1954, was paroled and was ordered excluded after the effective date of the 1952 Act (R. 40). Lam Wing arrived as a seaman, was ordered excluded, and then paroled prior to the effective date of the 1952 Act (R. 43).

Each of the respondents also alleged that in 1955, after each had been notified that Communist China had been designated as the place to which he would

be deported, he had applied for stay of deportation under Section 243(h) of the Immigration and Nationality Act of 1952 on the ground that he would be subject to physical persecution, but that he had been advised that his application could not be considered for the reason that a claim of physical persecution could not be asserted in an exclusion case. Each sought a judgment declaring that he was not deportable to Communist China and directing consideration of his claim of physical persecution. (R. 33, 34, 37-38, 40-41, 43-44).

The district court dismissed the complaints for lack of jurisdiction [1] and for failure to state a claim upon which relief might be granted (R. 35-36, 39, 42, 46). The court of appeals reversed, holding that aliens seeking admission who had been paroled into the United States; under Section 212(d)(5) of the 1952 Act, were "within the United States" for the purposes of Section 243(h).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the District of Columbia Circuit in these cases is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *Leng May Ma* v. *Barber*, 241 F. 2d 85, certiorari granted, 353 U.S. 981 (No. 105, this Term). The Ninth Circuit has held that relief un-

[1] This ruling was made before the decision of this Court in *Brownell* v. *Tom We Shung*, 352 U.S. 180, holding that an exclusion order may be reviewed in a declaratory judgment action.

der Section 243(h) of the Immigration and Nationality Act of 1952 is not available to excluded aliens, admitted into the United States on parole, since such aliens are not, in legal contemplation, "within the United States." The decision below is also directly in conflict with two recent decisions of the Second Circuit, copies of which are set forth in Appendix C, *infra*, pp. 13-15. The Second Circuit has, *per curiam*, affirmed, on the basis of the district court opinions, two rulings similar to that rendered in the *Leng May Ma* case.

CONCLUSION

The question raised by this petition is already before the Court in No. 105, this Term. Moreover, since the writ was granted in No. 105, a direct conflict among the circuits has developed. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12772
JIMMIE QUAN, a/k/a QUAN DUNG NGOON, APPELLANT
v.
HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12773
JOW MUN YOW and JOW KWONG YEONG, APPELLANTS
v.
HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12774
YEN MOK, APPELLANT
v.
HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

No. 12800
LAM WING, APPELLANT
v.
HERBERT BROWNELL, JR., Attorney General
of the United States, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided June 27, 1957

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellants.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Mr. Lewis Carroll*, Assistant United States Attorney, were on the brief, for appellee.

Before PRETTYMAN, FAHY and BURGER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These are four appeals from judgments of the District Court dismissing complaints in civil actions. The actions were brought by natives of China who arrived in the United States at various dates seeking admission. They were paroled into the United States in exclusion proceedings. Thereafter they were ordered excluded and deported to the place whence they came, which was Hong Kong.[1] They claim that deportation to Hong Kong is in fact deportation to Communist China and that if sent there they will be subject to physical persecution. They seek the benefit of Section 243(h) of the Immigration and Nationality Act of 1952,[2] which provides:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Government says the appellants are not "within the United States" and therefore the Attorney General has no power under the statute to withhold their deportation. The question before us is whether he has that power. We are not concerned with how

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[1] Appellant Lam Wing was paroled after an initial exclusion order.

[2] 66 STAT. 214, 8 U.S.C.A. § 1253(h).

he should exercise the power if he has it. We have to decide merely whether he has it.

Section 212(d)(5) of the 1952 Act [3] provides in pertinent part:

> "The Attorney General may in his discretion *parole into the United States* temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien * * *." (Emphasis ours.)

Thus it is clear that under the Act an alien may be paroled *into* the United States as well as admitted to it. In either event he is, in the statutory terms, in the United States. We think an alien paroled into the United States within the meaning of Section 212(d)(5) [4] is within the United States within the meaning of Section 243(h). Therefore as to him the Attorney General has a discretionary power to withhold deportation.

The Attorney General argues that there is a difference between excluding an alien and deporting him and that these aliens are to be excluded. But the very sentence of the statute which provides for excluding aliens [5] uses the word "deported". The concluding clause in that sentence is "shall be allowed to enter or shall be excluded and deported." And the

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[3] 66 STAT. 188, 8 U.S.C.A. § 1182(d)(5).

[4] The Act contains a number of provisions relating to aliens within the United States. See Sec. 237(a), 66 STAT. 201, 8 U.S.C.A. § 1227(a); Sec. 237(b), 66 STAT. 201, 8 U.S.C.A. § 1227(b); Sec. 262, 66 STAT. 224, 8 U.S.C.A. § 1302; Sec. 265, 66 STAT. 225, 8 U.S.C.A. § 1305; Sec. 360(a), 66 STAT. 273, 8 U.S.C.A. § 1503(a).

[5] Sec. 236(a), 66 STAT. 200, 8 U.S.C.A. § 1226(a).

sentence which provides for the return of excluded aliens on the vessel bringing them uses the words "deported" and "deportation".[6] The basic sentence is: "Any alien * * * who is excluded * * * shall be immediately deported * * *." And the proviso in that sentence is "unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." The regulations reflect the same idea.[7] For example, Section 240.1, Title 8, Code of Federal Regulations (1952) speaks of "The immediate deportation of an excluded alien". The distinction relevant to Section 243 is between aliens who are, legally speaking, in the United States, by entry or parole, and those who, legally speaking, are not within the borders.

That the predecessor section to Section 243(h) of the 1952 Act, which was Section 23 of the 1950 Act,[7] applied to an alien who was excluded and was settled by *Ng Lin Chong* v. *McGrath*.[8] Section 243(a) of the 1952 Act applies to aliens "in the United States". We think that section gives the Attorney General discretion in respect to the country to which he will order aliens deported, whether they are legally in the United States by entry or by parole.

The cases will be remanded to the District Court with instructions to enter declaratory judgments in accord with this opinion.

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[6] Sec. 237(a), 66 STAT. 201, 8 U.S.C.A. § 1227(a).

[7] 64 STAT. 1010.

[8] 91 U.S. App. D.C. 131, 202 F. 2d 316 (D.C. Cir. 1952).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.
C. A. 2801-55

No. 12,772

JIMMIE QUAN, a/k/a QUAN DUNG NGOON, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

April Term, 1957.
C. A. 2764-55

No. 12,773

JOW MUN YOW and JOW KWONG YEONG, APPELLANTS

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

April Term, 1957.
C. A. 2899-55

No. 12,774

YEN MOK, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

April Term, 1957.
C. A. 2934-55

No. 12,800

LAM WING, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

Appeals from the United States District Court for the District of Columbia

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Before: Prettyman, Fahy and Burger, Circuit Judges.

JUDGMENT

These cases came on to be heard on the records from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court with instructions to enter declaratory judgments in accord with the opinion of this Court.
Dated: June 27, 1957

Per Circuit Judge Prettyman.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 297—October Term, 1956.
(Argued June 10, 1957 Decided July 5, 1957.)
Docket No. 24414

UNITED STATES OF AMERICA *ex rel.* LUE CHOW YEE and LUE CHOW LON,
Relators-Appellants,

v.

EDWARD J. SHAUGHNESSY, District Director of the New York District of the Immigration and Naturalization Service,
Defendant-Respondent.

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge*.

Lue Chow Yee and Lue Chow Lon appeal from the dismissal of their petition for habeas corpus seeking stay of exclusion from this country on their claim for discretionary relief under §243(h) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1253(h).

See also *Lue Chow Kon* v. *Brownell*, 2 Cir., 220 F.2d 187, affirming D. C. S. D. N. Y., 122 F. Supp. 370.

CHARLES SPAR, of Spar, Schlem & Burroughs, New York City (Max K. Schlem and Joseph

L. Andrews, of Spar, Schlem & Burroughs, New York City, on the brief), *for relators-appellants*.

ROY BABITT, Sp. Asst. U. S. Atty. and Gen. Atty., Immigration and Naturalization Service, New York City (Paul W. Williams, U. S. Atty., S. D. N. Y., and Harold J. Raby, Asst. U. S. Atty., New York City, on the brief), *for defendant-respondent*.

PER CURIAM:

Affirmed on the opinion of District Judge Kaufman below, D. C. S. D. N. Y., 146 F. Supp. 3; and see also *Leng May Ma* v. *Barber*, 9 Cir., 241 F. 2d 85, certiorari granted —— U. S. ——, June 3, 1957.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 316—October Term, 1956.
(Argued June 10, 1957 Decided July 5, 1957.)
Docket No. 24246

DONG WING OTT and DONG WING HAN,
Plaintiffs-Appellants,

v.

EDWARD J. SHAUGHNESSY, District Director of the New York District of the Immigration and Naturalization Service,
Defendant-Respondent.

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Dong Wing Ott and Dong Wing Han appeal from the denial of an injunction for stay of deportation on their claim for discretionary relief under §243(h) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1253(h).

See also *U. S. ex rel. Dong Wing Ott* v. *Shaughnessy*, 2 Cir., 220 F. 2d 537, affirming D. C. S. D. N. Y., 116 F. Supp. 745, certiorari denied 350 U. S. 847.

ELMER FRIED, New York City, *for plaintiffs-appellants*.

ROY BABITT, Sp. Asst. U. S. Atty. and Gen. Atty., Immigration and Naturalization Service, New York City (Paul W. Williams, U. S. Atty., S. D. N. Y., Charles J. Hartenstine, Jr., Sp. Asst. U. S. Atty., and Harold J. Raby, Asst. U. S. Atty., New York City, on the brief), *for defendant-respondent*.

PER CURIAM:

Affirmed on the opinion of District Judge Murphy below, D. C. S. D. N. Y., 142 F. Supp. 379; and see also *Leng May Ma* v. *Barber*, 9 Cir., 241 F. 2d 85, certiorari granted —— U. S. ——, June 3, 1957.

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